

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:) Bankruptcy Case
) No. 3-89-04281-TC
) Chapter 11

WILLIAM M. MILLER,)

Debtor.)

WILLIAM M. MILLER,)

Plaintiff,)

vs.)

UNITED STATES OF AMERICA,)
through its DEPARTMENT OF TREASURY)
INTERNAL REVENUE SERVICE; and)
STATE OF CALIFORNIA, through its)
STATE BOARD OF EQUALIZATION,)

Defendants.)

Adv. Proc. No. 00-3-077-TC

O P I N I O N

Thomas E. Carlson, Bankruptcy Judge.

Debtor seeks to bar taxing authorities from collecting other-wise nondischargeable debts on the basis that his chapter 11 plan provides for their discharge and that principles of res judicata require all plan terms to be fully enforced. The

OPINION

1 requested relief is denied because the plan did not provide
2 clearly enough for the discharge of nondischargeable debts.

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4 **FACTS**

5 Debtor filed a petition under chapter 11 of the Bankruptcy
6 Code on December 20, 1989. In January 1994, he filed a chapter
7 11 plan that provided for full payment of allowed priority tax
8 claims over five years with interest from the date of
9 confirmation. The amount of the allowed claims of the Internal
10 Revenue Service (IRS) and California State Board of Equalization
11 (SBE) were fixed by stipulation.

12 Article XI of the plan, entitled "DISCHARGE AND INJUNCTION,"
13 provides:

14 Except as otherwise provided in the Confirmation
15 Order or this Plan, the Confirmation Order will act as
16 a discharge and termination, as of the Effective Date,
17 of any and all liabilities and debts of, and claims
18 against the Debtor that arose at any time before the
19 Confirmation Order, including any interest accrued on
20 such claims from and after the Petition Date or
21 interest which would have accrued but for the
22 commencement of this Reorganization Case, against the
23 Debtor. The discharge of the Debtor will be effective
24 as to any claim, regardless of whether a proof of claim
25 or interest thereof was scheduled or filed, whether the
26 claim is an Allowed Claim, or whether the holder of
27 thereof votes to accept or reject this Plan.

28 Except as otherwise provided in this Plan, on the
Effective Date, all entities shall be precluded from
asserting against the Debtor any other or further debts
or interests based upon any act, omission, transaction,
or other activity of any kind that occurred prior to
the Confirmation Date, all of which debts and interests
shall be conclusively deemed released and discharged,
as provided in 11 U.S.C. 524 and 1141, and such
discharge shall void any judgement against the Debtor
at any time obtained to the extent that it relates to a
claim discharged.

OPINION

1 Neither the IRS nor the SBE objected to confirmation. The
2 plan was confirmed on April 4, 1994. Neither the IRS nor the
3 SBE appealed the Confirmation Order.

4 After Debtor made all payments required under the plan, the
5 IRS and the SBE attempted to collect penalties and interest for
6 the four-year gap period between the petition date and the
7 confirmation date, which was not part of their allowed claims.
8 Debtor filed this action to obtain a determination that the gap
9 period obligations were discharged under the plan. Presently
10 before the court is Debtor's motion for summary judgment in that
11 action.

12 13 **DISCUSSION**

14 An individual chapter 11 debtor is generally liable for
15 post-petition, preconfirmation interest on a priority tax claim
16 even after the allowed claim is paid in full through the chapter
17 11 plan. A chapter 11 plan must pay the allowed amount of all
18 priority tax claims with interest from the date of confirmation.
19 11 U.S.C. § 1129(a)(9)(C). The allowed amount of the claim does
20 not include postpetition, preconfirmation interest. 11 U.S.C.
21 § 502(b)(2). In a case involving an individual, the
22 confirmation of a chapter 11 plan does not discharge debts
23 excepted from discharge under section 523(a). 11 U.S.C. §
24 1141(d)(2). Priority tax claims are excepted from discharge
25 under section 523(a). 11 U.S.C. § 523(a)(1). The Ninth Circuit
26 has held that postpetition, preconfirmation interest is part of
27 the nondischargeable debt even though it is not part of the

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OPINION

1 allowed claim against the bankruptcy estate. In re Artisan
2 Woodworkers, 204 F.3d 888 (9th Cir. 2000)(citing Bruning v.
3 United States, 376 U.S. 358 (1964)).

4 The Ninth Circuit has also held, however, that a plan
5 providing for the discharge of debts that the Bankruptcy Code
6 excepts from discharge must be enforced if no appeal is taken
7 from the confirmation order. In re Pardee, 193 F.3d 1083 (9th
8 Cir. 1999); accord Trulis v. Barton, 107 F.3d 685, 691 (9th Cir.
9 1995). In Pardee, the debtor's chapter 13 plan provided for
10 payment of a fixed sum to a student loan creditor. The plan
11 also provided "any remaining unpaid amounts, if any, including
12 any claims for interest, shall be discharged by the Plan."
13 Pardee, 193 F.3d at 1085 n.5. The affected creditor did not
14 object to confirmation or appeal the confirmation order. When
15 the affected creditor later attempted to collect postpetition
16 interest on the claim, the bankruptcy court granted the debtor's
17 motion to enjoin further collection efforts. The Ninth Circuit
18 affirmed. The court acknowledged that the claim for
19 postpetition interest was probably nondischargeable by statute.
20 Id. at 1085 n.4. Nonetheless, the court held that the plan
21 provision discharging the debt was enforceable under principles
22 of res judicata, because the affected creditor had not appealed
23 the order confirming the plan. Id. at 1086-87.

24 In the present case, Debtor contends that the plain language
25 of Article XI of the plan provides for discharge of the gap
26 period obligations to the IRS and the SBE. He acknowledges that
27 those obligations were not part of the allowed claims of the IRS
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1 and the SBE, and were therefore not paid through the plan. He
2 further acknowledges that the Bankruptcy Code provides that
3 confirmation of a plan does not discharge such claims. Relying
4 upon Pardee, however, Debtor argues that the provision of the
5 confirmed plan discharging the gap period claims is enforceable
6 under principles of res judicata.

7 The IRS and the SBE do not dispute that the provisions of
8 the plan are res judicata, but contend that Article XI does not
9 provide for the discharge of their gap period claims. They
10 contend that Article XI is ambiguous and that this ambiguity
11 should be construed against Debtor.

12 It is well established that a chapter 11 plan is a contract
13 between the debtor and its creditors that is subject to the
14 general rules governing the interpretation of contracts under
15 the law of the state in which the plan was confirmed. Hillis
16 Motors, Inc. v. Hawaii Auto. Dealers Ass'n, 997 F.2d 581, 588
17 (9th Cir. 1993); In re Bartleson, — B.R. —, 2000 WL 1370427,
18 at *2 (B.A.P. 9th Cir. 2000); In re Affordable Housing
19 Development Corporation, 175 B.R. 324, 329 (B.A.P. 9th Cir.
20 1994). Whether a contract is ambiguous is a question of law.
21 In re Stratford of Texas, Inc., 635 F.2d 365, 368 (5th Cir.
22 1981); Jones-Hamilton Co. v. Beazer Materials & Services, Inc.,
23 973 F.2d 688 (9th Cir. 1992).

24 The plan is ambiguous as to whether it discharges claims for
25 postpetition interest that would ordinarily be nondischargeable.
26 On the one hand, the first paragraph of Article XI states that
27 confirmation of the plan acts as a discharge of all
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1 preconfirmation claims, including claims for postpetition
2 interest. This paragraph clearly covers the gap claims of the
3 IRS and the SBE. Moreover, by referring to all debts, rather
4 than all dischargeable debts, this paragraph can be read to
5 extend the discharge to debts that would be nondischargeable
6 under sections 523(a) and 1141(d)(2). On the other hand, the
7 second paragraph of Article XI states all debts arising before
8 confirmation shall be discharged "as provided in 11 U.S.C. 524
9 and 1141. . . ." This language can easily be read to limit the
10 scope of discharge to that provided by section 1141(d)(2).
11 Thus, the entire discharge provision can be interpreted as
12 merely restating the law regarding the effect of discharge, a
13 type of provision included in many chapter 11 plans.

14 The ambiguity in Debtor's plan cannot be resolved through
15 the doctrine that a contract must be construed as a whole to
16 give effect to all parts. Cal. Civil Code § 1641. If the
17 language providing for the discharge of postpetition interest
18 would be deprived of all meaning if it were not applied to the
19 debts owed the IRS and the SBE, this court might be compelled to
20 resolve the ambiguity in favor of Debtor. Such is not the case.
21 The language in question is contained in a general provision
22 regarding discharge, not in the provisions defining the
23 treatment of the IRS and the SBE claims. Thus, the language
24 will still operate to discharge claims for postpetition interest
25 on dischargeable debts, even if it is construed not to apply to
26 debts excepted from discharge.

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OPINION

1 The language in Debtor's plan is very different from the
2 plan provision at issue in Pardee. In that case, the language
3 providing for the discharge of all claims for postpetition
4 interest was in the provision defining the treatment of the
5 student loan creditor who later attempted to collect
6 postpetition interest. In Pardee, the plan provided in relevant
7 part:

8 **Greater Lakes Higher Education**, 2401 International
9 Way, Madison WI 53704 in the amount of \$26,235.00.
10 This obligation was incurred by Robert McKnight Pardee
11 and [is] in default. Great Lakes Education shall be
12 paid through the Plan and *Great Lakes Higher Education
shall receive the total amount of \$26,235.00 for its
claim and any remaining unpaid amounts, if any,
including any claims for interest, shall be discharged
by the Plan.*

13 Pardee, 193 F.3d at 1085 n.5. In the present case, the
14 provisions defining the treatment of the IRS and the SBE contain
15 no language regarding the discharge of claims for postpetition
16 interest.^{1/}

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19 ^{1/} Article IV of Debtor's confirmed plan provides for the
following treatment of the priority claims of the IRS and the SBE:

20 **Internal Revenue Service.** A payment equal to fifty
21 percent (50%) of its total Allowed Claim on the Effective
22 Date; the balance payable in sixty (60) equal monthly
23 installments, commencing on the first day of the second
24 month following the Effective Date. The unpaid balance of
said claim shall bear interest at the rate of six percent
per annum, which interest shall accrue and be paid with the
final payment.

25 **State of California, Board of Equalization.** A payment
26 equal to twenty five percent (25%) of \$175,000 on the
27 Effective Date; the balance payable in sixty (60) equal
monthly installments, commencing on the first day of the
second month following the Effective Date. The unpaid
balance of said claim shall bear interest at the rate of

(continued...)

1 The ambiguity in the plan should be resolved against the
2 Debtor because Debtor drafted the plan. California law provides
3 than an ambiguous contractual provision should be construed
4 against the party responsible for the ambiguity. Cal. Civil
5 Code § 1654; Weeshoff Constr. Co. v. Los Angeles County Flood
6 Control Dist., 152 Cal. Rptr. 19, 23 (Cal. App. 1979). Some
7 bankruptcy court decisions apply the same rule in interpreting
8 chapter 11 plans without expressly relying upon state law. In
9 re Maruko, Inc., 200 B.R. 876, 881 (Bankr. S.D. Cal. 1996); In
10 re Harstad, 155 B.R. 500, 510-11 (Bankr. D.Minn. 1993). This
11 rule has extra force where the contract has been drafted by an
12 attorney. Mayhew v. Benninghoff, 62 Cal. Rptr. 2d 27, 30 (Cal.
13 App. 1997). For the purpose of Debtor's motion for summary
14 judgment, I must assume that the plan was drafted by Debtor's
15 counsel.^{2/}

16 The ambiguity in the plan should also be construed against
17 Debtor because Debtor seeks to enforce what is in substance the

19 ^{1/}(...continued)

20 six percent per annum, which interest shall accrue and be
21 paid with the final payment.

22 ^{2/} Debtor argues in his reply brief that ambiguities should no
23 be resolved against him as the drafter of the plan, because the
24 treatment of the IRS and the SBE claims was actively negotiated by
25 parties. California cases do recognize that where contract terms
26 actively negotiated, neither party should be considered the drafter
27 Dunne & Gaston v. Keltner, 123 Cal. Rptr. 430, 432 n.3 (Cal. App.
28 1975); Indenco, Inc. v. Evans, 20 Cal. Rptr. 90, 94 (Cal. App. 196
Debtor's motion for summary judgment, however, is not supported by
evidence supporting this contention. Debtor's moving papers argue
only that the plain language of Article XI clearly provides for the
discharge of the gap period claims of the IRS and the SBE. More
important, Debtor submitted no declarations or other evidence
regarding the extent or content of any negotiations between the
parties.

OPINION

1 waiver of a statutory right. Congress has provided through
2 section 1141(d)(2) that confirmation of a chapter 11 plan does
3 not discharge a debt excepted from discharge under section
4 523(a). Debtor urges an interpretation of the plan that would
5 make that statute inapplicable.

6 California courts have held that a contract providing for
7 the waiver of a statutory right will be enforced only if the
8 waiver language is so clear that the intention to waive the
9 right is unmistakable.

10 The first principles of waiver buttress our
11 conclusion. Waiver is the intentional relinquishment
12 of a known right. "The burden is on the party claiming
13 the waiver to prove it by clear and convincing evidence
14 that "'does not leave the matter doubtful or
uncertain. . . .'" Waiver requires "'sufficient
awareness of the relevant circumstances and likely
consequences.'"

15 These principles emphasize actual knowledge and
16 awareness of what is being waived, and require
resolution of doubts against waiver.

17 Cathay Bank v. Lee, 18 Cal. Rptr. 2d 420, 423-24 (Cal. App.
18 1993) (citations omitted).

19 The plan provision in question is not sufficiently clear to
20 override section 1141(d)(2) under this standard.^{3/} In Cathay
21 Bank, the court held that the purported waiver was insufficient
22 because it neither identified the right to be waived by citation
23 to the applicable statute, nor did it explain the substance of

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25 ^{3/} Neither Pardee nor Trulis address the standard for
26 determining whether a plan provision overriding the statutory limit
27 on discharge is sufficiently clear to be enforceable. It does not
28 appear that the creditor raised the issue in either case, as neither
decision addresses the issue. In each case, the Ninth Circuit stated
summarily that the plan provision in question is clear. Pardee, 1
F.3d at 1085-86; Trulis, 107 F.3d at 691.

1 the right to be waived. Cathay Bank, 18 Cal. Rptr. at 424-25.
2 The plan language at issue here contains the same flaws. It
3 does not state that section 1141(d)(2) is not to apply. Nor
4 does it state expressly that confirmation of the plan will
5 discharge debts that would otherwise be nondischargeable.
6 Rather, Debtor relies upon the omission of the single word
7 "dischargeable" in a provision that otherwise appears only to
8 restate sections 1141 and 524. This is not the unambiguous
9 language necessary to override the provisions of section
10 1141(d)(2).

1 Debtor's motion for summary judgment is denied.

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8 Dated: October 3, 2000.....

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Thomas E. Carlson
United States Bankruptcy Judge

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OPINION